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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 187

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL POWER COMMISSION, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on March 30, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals (Docket No. 15687, decided March 30, 1961, Appendix A.) is not yet reported. The Federal Power Commission's Opinion and Order Issuing Certificates of Public Convenience and Necessity Authorizing Merger with Conditions and Adopting with Modifications the Decision of the Presiding Examiner, issued on December 23, 1959 (R. 1290-1310) and its Opinion and Order Denying Petition for Rehearing and Stay, issued on February 17, 1960 (R. 1353-1358) in the consolidated proceedings entitled "Pacific Northwest Pipeline Corporation, Docket No. G-13018" and "El Paso Natural Gas Company, Docket No. G-13019", are reported at 22 FPC 1092, 31 PUR 3d 456 and 23 FPC 350.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1961. Petitioner herein did not petition for rehearing before the Court of Appeals.[1] Thus, the court's judgment entered on March 30, 1961 became final on April 14, 1961. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717(r).[2]

QUESTIONS PRESENTED

1. May the Federal Power Commission approve, in the public convenience and necessity, the merger of two natural gas companies, absent statutory authority to determine violations of the Clayton Act, and particularly where such ap-

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1. The Court of Appeals' Rule 26 allows fifteen days after judgment or decision to petition for rehearing.

2. Act of June 21, 1938, c. 556, § 19, 52 Stat. 821-833, as amended; 15 U.S.C. 717-717w.

proval is granted while a charged violation of Section 7 of the Clayton Act is pending and not adjudicated before the judicial department of government?

2. May the Federal Power Commission preclude inquiry into the economic impact of such merger upon the public and, failing to know or to measure the consequences of such impact, still find such merger to suit the public interest?

3. May the Federal Power Commission be held to have conducted its proceedings as required by due process where it admittedly ignored evidence admitted into the record; where it found sufficient competition to dispel any claimed violations of the antitrust laws, through the curious device of taking official notice of other pipeline projects not yet in being nor even authorized; where cross-examination upon the economic impact of such merger upon consumers was restricted and precluded?

4. May the Federal Power Commission be held to have conducted its proceedings as required by due process where, upon a long and complex record in which due deliberation was requisite to a fair judgment, members of the Commission reached a quick decision after ex parte meetings with applicants in which expedition was urged?

STATUTES INVOLVED

The relevant parts of the statutes involved are set forth in the Appendix B. Citations to them are:

1. Clayton Act, Act of October 15, 1914, c. 323, § 7, 38 Stat. 731; as amended December 29, 1950, c. 1184, 64 Stat. 1125; 15 U.S.C. § 18.
2. Natural Gas Act, Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U.S.C. § 717 (1958); §§ 4(a) and (b), 15 U.S.C. §§ 717(c)(a) and (d); §§ 7(b), (c), (d), and (e), 15 U.S.C. §§ 717(f)(b), (c), (d), and (e); §§ 19(a) and (b), 15 U.S.C. §§ 717(r)(a) and (b).

STATEMENT OF THE CASE

A. The Parties and the Nature of Their Interest.

The parties to the proceeding in the court below are:

1. Petitioner, the People of the State of California, hereinafter called California. California's interest in this proceeding stems from its unique dependence upon natural gas as a fuel. Since California does not possess coal deposits sufficient for its energy requirements, it is compelled to rely upon natural gas. California relies upon one out-of-state supplier for approximately three-quarters of its needs. Ninety percent of all homes in California are heated by natural gas and California industry depends upon natural gas a a fuel.

During the year 1960, out-of-state suppliers sold 838,800,000,000 cubic feet of gas to California utilities. These sales account for over ten per cent of all the natural gas moving in interstate commerce throughout the United States.

2. Respondent, Federal Power Commission, hereinafter called Commission, an independent commission established pursuant to the Federal Power Act.[3] Under the Natural Gas Act, the Commission is charged with the duty of regulating the rates of natural gas companies subject to its jurisdiction.

3. Intervenor, El Paso Natural Gas Company, a Delaware corporation, hereinafter called El Paso. El Paso is a natural gas company as defined by Section 2(6) of the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717a). As such it is subject to the jurisdiction of the respondent Commission.

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3. Act of June 10, 1920, c. 285, 41 Stat. 1063, as amended; 16 U.S.C. 791, et seq.

El Paso was originally organized to bring gas to the area in and around El Paso, Texas. In 1946, it first obtained authorization to deliver gas to the California market. It is the out-of-state supplier of natural gas to California, and as such has experienced phenomenal growth. Today it is one of the largest nonfinancial corporations in the United States. At the end of 1957 it ranked 29th in size and was the largest of the natural gas companies.

During the past year, it sold 804,600,000,000 cubic feet of gas to California utilities, for which it received a price of $272,000,000. This price represents 81% of El Paso's total operating revenues. It sells more than two-thirds of its gas to California gas distributing utilities, for resale to more than 4,000,000 California consumers. While the local gas distributing uitilities are subject to California regulation, the price of the natural gas to the California consumer is largely dependent upon the rates fixed by the Commission for the sale of gas by El Paso for resale in California. These rates are affected by costs. Thus, El Paso's costs are a matter of vital concern to the California consumer.

B. The Proceedings Before the Commission.

On August 7, 1957, El Paso and the Pacific Northwest Pipeline Corporation, hereinafter referred to as Pacific, applied to the Commission for its approval of a merger of their assets.[4]

An understanding of the relationship between Pacific, El Paso, and the California market is necessary to appreciate fully the apparent motives underlying this action.

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4. Pacific applied under Section 7(b) of the Act for permission to abandon facilities (R. 1071-1087); El Paso applied for a certificate approving its acquisition of Pacific's facilities, under Section 7(c) of the Act (R. 1087-1111).

Pacific was incorporated under the laws of Delaware on June 2, 1949. In 1954, the Commission approved Pacific's application to conduct pipeline operations in the Pacific Northwest. Pacific's hopes for a profitable operation were not fulfilled. Earnings did not come up to expectation (R. 40, 54, 394).

When Pacific was organized, its promoters hoped to be able to transmit gas to the California market. In 1956, negotiations were entered into with a view toward this end with the Southern California Edison Company and with the Pacific Gas and Electric Company, two California gas distributing utilities (R. 243-5).

Meanwhile, prior to these negotiations, El Paso had become interested in acquiring Pacific (R. 124). At the same time that Pacific was attempting to enter the California market, El Paso was negotiating with Pacific for its acquisition. And when El Paso learned of Pacific's attempts to enter the California market, its president, Mr. Paul Kayser, advised the Southern California Edison Company that any dealings between it and Pacific "would not be in the public interest." (R. 401)

The negotiations between El Paso and Pacific were not easily consummated. El Paso wanted to carry out the merger with the blessing of the Commission, but Pacific, then involved in financing and constructing pipelines, wanted to avoid extended proceedings before the Commission, and insisted that the merger be accomplished by an exchange of stock.

The chronology of negotiations and events carries a significance and adds to the admission of El Paso that the

applications filed with the Commission were considerably stimulated by the imminence of the complaint filed in the court.

Date	Event
June 18, 1954	Pacific granted a certificate of public convenience and necessity by the Commission to operate a pipeline.
May and August, 1956	Pacific negotiated with California gas distributing utilities to serve the California market.
Fall of 1956	Paul Kayser, President of El Paso, flies to California and advises them that an arrangement with Pacific "would not be in the public interest."
November 8, 1956	El Paso and Pacific enter into a stock exchange agreement.
November 15, 1956	Paul Kayser, President of El Paso, and Arthur Dean, attorney, confer with Herbert Brownell, United States Attorney General, concerning applicability of the antitrust statutes to the transaction. Later that day Paul Kayser meets with the Federal Power Commissioners.
December 31, 1956	El Paso is advised by letter from the Securities and Exchange Commission of possible antitrust implications and violations in the proposed stock exchange.
January, 1957	Pacific becomes operational.
July 22, 1957	The United States Attorney General filed a complaint entitled "United States v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation," Civil No. 143-57, U.S.D.C. for Utah, Central Division, alleging that the purchase of Pacific stock by El Paso was a lessening of competition, tending to create a monopoly, in violation of Section 7 of the Clayton Act.
August 7, 1957	Pacific and El Paso file applications with the Commission seeking, respectively, one to abandon and the other to acquire assets and facilities.

1. THE ADMINISTRATIVE HEARING.

The proceedings before the Commission began on September 17, 1958. There were 23 days of hearing between September 7, 1958 and June 6, 1959. During this period, the Commission's Presiding Examiner received 500 exhibits in evidence.

Applicants sought approval from the Commission upon the premise of benefits to both companies and to the rate payers thereof. Lower rates were predicted—indeed, speculated upon would be more accurate. No showing was made by applicants, however, as to when or how or in what manner future rates to consumers were to be lowered. Nor did applicants make any showing as to the effect of the merger upon future rates, despite the insistence of California that such was not only relevant but critical to a disposition of the proceedings.

California and the staff of the Commission attempted to explore, by way of cross-examination, the impact of admitted revenue deficiencies of Pacific upon the merged companies, but California and the staff were precluded from such cross-examination by ruling of the Presiding Examiner.

2. THE EXAMINER'S DECISION, ORAL ARGUMENT, AND THE ORDER OF THE COMMISSION.

The merger was approved by the Presiding Examiner on November 20, 1959. On December 10, 1959 the Commission heard oral argument upon this vast, complex, and far-reaching case. Thirteen days later—on December 23, 1959—the Commission issued its order adopting and affirming the decision of the Examiner (R. 1290-1310).

In brief, both the Examiner and the Commission accepted the benefits posed and predicted by applicants, pointing to access to Canadian gas reserves, improvement in the financial posture of Pacific, and the anticipation of lower rates.

The Commission found no clash of public policy between the Natural Gas Act and the antitrust laws, but referred to "a positive legislative intent to permit mergers of natural gas companies when found by the Commission to be in the public interest, *even in the presence of the things sought to be prevented by the Clayton Act.*" (R. 1183, emphasis added.)

At oral argument applicants made specific request that the Commission expedite its decision in these proceedings.

From the oral argument made before the Commission on behalf of applicants is this statement:

> "We are full [sic] conscious of the many pressing demands upon the Commission's time, but we urge you to act promptly and *early next week, if possible.*" [Emphasis added.] (Reporter's Transcript of Oral Argument before the Federal Power Commission, page 2935, lines 23 to 25.)

The plea for expedition having been made upon the record, California, upon notice as to applicants' desire for haste, responded at oral argument in this manner:

> "And, please, gentlemen, we are not anxious for a decision within a week, not a week, not on a matter so grave as this." (Reporter's Transcript, page 3019, lines 16-18.)

3. THE FICTION OF COMPETITION.

In his decision the Examiner, without any evidence as to the quantity or quality of any competition which might arise in the future, found that the Transwestern Pipeline Company, (then seeking to serve California) which became certificated after the merger proceedings had closed, "may well become competitive" to El Paso; and again, "Transwestern might also become a competitor for gas produced in the Aneth field * * *." The Examiner found, "El Paso

will have competition from P.G.T.", referring here to a pipeline application the hearings of which had not even concluded before the Commission (Page 1195, Record).

The order of the Commission picked up competition without any exploration in the record as to Transwestern Pipeline Company and then found competition from the Pacific Gas Transmission project in these words: "While this latter project has not been approved by us, it indicates, at least, a tendency for competition to develop for the California market." (Page 1297, Record)

This furnishing of competition *in futuro* came about through taking of official notice by the Examiner of such other pipeline applications, which at the time were no more than applications.

4. DISCLOSURE SUBSEQUENT TO THE DECISION.

Following the merger proceedings, hearings were held before the Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce of the House of Representatives of the United States, relating to Federal Power Commission matters. The testimony before that Subcommittee disclosed that during the period of time the merger applications and proceedings were before the Commission, telephone calls and visits were made upon certain Commissioners who participated in the decision by representatives of applicants.

Social contacts during the pendency of these proceedings were also recited.

Upon one occasion applicants' representative requested a Commissioner "to hurry some cases along." On another occasion it was stated, with reference to El Paso's representative, "He does come into the office occasionally, in which usually a matter of expediting, getting cases going,

would be mentioned."[5] It should be pointed out that as to most of these meetings no recollection remained as to the conversations which occurred or, when it did, memory dictated that the merits of cases were not discussed. The expedition of matters before the Commission was discussed, however. And some matters were discussed, "I don't believe that he ever discussed any business matter with me on more than two or three occasions."

The precise dates of office visits, telephone calls, social engagements—all of these are set forth in the reporter's transcript of the hearings before the Subcommittee.[6]

C. The Proceedings in the Court Below.

California petitioned the United States Court of Appeals for the District of Columbia Circuit to review the decision of the Commission in this case, pursuant to Section 19(b) of the Natural Gas Act.

California urged that the Commission had authorized a merger not consistent with the public convenience and necessity, in that it improperly decided the antitrust issue; it found benefits where none existed in the record; it acted contrary to the requirements of due process by virtue of the conduct of its Examiner, by improperly utilizing the device of official notice, and by the Commission itself voting upon a matter after exposure to ex parte contacts designed to influence and to expedite their disposition of the matter.

REASONS FOR GRANTING THE WRIT

The problems which are created by the decision of the court below and of the Commission are many, and call for

5. Committee Transcript, p. 919.

6. Pages 444, 461, 467-9, 507-8, 522-525, 851-853, 879-895, 918-19, 949, Committee Transcript.

immediate resolution. The law as it exists today with regard to the applicability of the national antitrust policy to regulated natural gas pipelines is vague and uncertain, and it not susceptible to either precise or uniform enforcement. A decision in this area by this Court is needed.

Serious questions involving the standard of ethics in the administration of federal law by an agency of the United States of America are raised. This Court is called upon to exercise its supervisory power in this field, and to define the standards of fairness to be followed by the independent regulatory agencies.

The questions to be determined in this case are matters which have never before been presented to the courts, insofar as the interpretation and administration of the Natural Gas Act is involved.

These issues are heightened by the social and economic interests of consumers here involved.

A. The Decisions of the Court Below and of the Commission Fail to Accommodate the Complementary Policies Underlying the Clayton Act and the Natural Gas Act.

1. THE POLICIES UNDERLYING THE TWO ACTS.

The purpose of the antitrust acts is to preserve to the people governmental protection against the evils attendant upon unrestrained monopoly. Absence of competition in an otherwise "free enterprise" economy offers the monopolist the power to charge the public all the traffic will bear. Congress, in enacting this scheme of general regulation, intended to protect the public from this evil by preserving free and unfettered competition as the rule of trade.[7]

Protection of the public against the powers enjoyed by unrestrained private monopolies is the policy underlying

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7. Northern Pac. R. Co. v. U.S., 356 U.S. 1, 2 L.Ed. 2d 545, 78 S. Ct. 514, 517 (1958).

the Natural Gas Act. This Court has held the primary purpose of the Act to be that of protecting "the consumer interests against exploitation at the hands of private natural gas companies."[8, 9]

California recognizes that it would be uneconomical to authorize the unrestricted building of pipelines to its borders. Such would be detrimental to the existing supplier, El Paso, and would serve neither private nor public interest. This awareness, however, of the advantages of a single service does not justify the extension of such single service or monopoly to other areas and territories which are foreign to its regular places of operation. By this California simply means that recognizing the unique status of El Paso, serving California previously as its sole out-of-state supplier, cannot make valid argument that El Paso should then serve the entire Western United States. Or, if such geographical extension be lawful or logical, it must follow that El Paso should then absorb other Rocky Mountain or Mid-Western pipelines until ultimately the nation, is dependent upon a single mammoth supplier. Here is where the monopoly aspect of this case becomes clear. This is not a question of attempting to defeat the established monopoly position of El Paso. On the contrary, this is an attempt to lay bare the attempt of El Paso to fasten upon the entire western portion of the United States a single pipeline corporation, with all of the economic power and force it derives therefrom.

Not all industries subject to regulation are to enjoy monopolies in their respective fields. The gas pipeline industry is not a "natural monopoly" in the sense that a local gas

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8. FPC v. Hope Natural Gas Co., 320 U.S. 591, 88 L.Ed. 333, 64 S. Ct. 281 (1944).

9. Prior to enactment of the Natural Gas Act, 56% of all natural gas transmitted in interstate commerce was controlled by four holding companies and 15 companies controlled 81% of the transmission. (S. Doc. No. 92, Part 84-A, 70th Cong., 1st Sess.).

distribution company is. There is nothing in the Natural Gas Act to suggest that Congress thought monopoly, regulated or otherwise, is better than competition. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission.*[10]

To some extent, the Commission is bound to consider the effect its approval of a proposed project will have upon competition. The controlling case in this area is *City of Pittsburgh v. Federal Power Commission.*[11] There the court said:

> "The Commission, while it 'has no power to enforce the Sherman Act * * * [and] cannot decide definitely whether the transaction contemplated constitutes * * * an attempt to monopolize which is forbidden by that Act * * *' nevertheless 'cannot, without more, ignore the [Act] * * *'
>
> "Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental natural policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity."

In dealing with the instant case, the court below said (Opinion, at p. ....):

> "When the Power Commission considers the policies and provisions of the antitrust laws in respect to the transactions of utilities under its jurisdiction, it is not required to—and indeed should not—begin with a general premise that competition is always and under all circumstances in the public interest. Its premise should be that the antitrust laws in certain areas of our economy and the regulatory laws in other areas are supplementary enactments and each must be given full effect in its area, recognizing always its concomitant body of law in the other area."

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10. 169 F.2d 881 (D.C. Cir., 1948).

11. 237 F.2d 741 (1956).

2. PROCEDURAL STRUCTURES OF THE TWO ACTS.

Enforcement of the Clayton Act is entrusted to the Department of Justice. Congress has lodged jurisdiction over alleged violations of the antitrust laws in the federal courts,[12] and in cases in which the government is a party, provides for direct appeal to this Court from the United States District Court.[13]

Insofar as antitrust violations are concerned, the Natural Gas Act is virtually silent, except that it provides that the Commission shall transmit to the government information which it thinks might indicate possible violations. The Natural Gas Act itself provides no remedy for such violations.[14]

Section 7 of the Clayton Act excepts from its provisions transactions duly consummated pursuant to authority given by the Commission under any statutory provision vesting such power in such Commission.[15]

3. APPLICATION OF THESE ACTS BY THE COMMISSION TO THE FACTS OF THIS CASE DID NOT ACCOMMODATE THE COMPLEMENTARY POLICIES UNDERLYING EACH.

The antitrust action in the District Court of Utah was stayed pending the final result in the application case before the Commission. On September 8, 1958 California, by formal filed motion, requested the Commission to stay its proceedings until such time as the antitrust issues of the case were resolved by a federal court. (R. 1135-1145.) The Com-

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12. Act of October 15, 1914, c. 323, § 15, 38 Stat. 736; 15 U.S.C. § 24.

13. Act of February 11, 1903, c. 544, § 2 as amended, 32 Stat. 823 as amended; 15 U.S.C. § 29.

14. Act of June 21, 1938, c. 556, § 20, 52 Stat. 832; 15 U.S.C. § 717s (a).

15. Act of October 15, 1914, c. 323, § 7, 38 Stat. 731; amended December 29, 1950, c. 1184, 64 Stat. 1124-1125; 15 U.S.C. § 18.

mission refused to continue its hearings until the District Court made a finding as to whether or not a violation of the antitrust laws had occurred because of the stock acquisition by El Paso.

Never at any time, throughout the proceedings before the Commission nor to date, has there been an exploration of or a determination of the lawfulness, with reference to antitrust law, of the stock acquisition of Pacific by El Paso.

This left the Commission in a position in which no definitive finding had ever been made by the court entrusted with such jurisdiction as to the propriety of the conduct of the applicants before it. The Commission, of course had no power to make such a specific finding.[16] Nor did it have any remedy or sanction it could impose for such violation short of denying the issuance of the certificate. Yet somehow, in a general and undefined manner, it was to "consider a congressional expression of fundamental national policy."

California asserts that the question should have first been resolved by the District Court before the Commission proceeded to consider the application.

The usual reasons for the application of the so-called doctrine of "primary administrative jurisdiction" do not apply to the facts of this case. The reasons usually cited for the rule are that it is essential to uniform enforcement of federal law to have the agency first pass on the transaction, and that complex technical questions are best left to the agency's expertise.[17] Generally, these questions have arisen where the enforcement of but one act is involved. Here, accommodation of two competing policies is at issue.

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16. *City of Pittsburgh v. Federal Power Commission*, 237 F.2d 741 (1956).

17. *Texas & P. R. Co. v. Abilene Cotton Co.*, 204 U.S. 426, 51 L.Ed. 553, 27 S. Ct. 350 (1906).

The result of the Commission's premature entertainment of these applications is chaotic. Resulting therefrom is an importation into the antitrust laws of the vague, ever-changing concept of "public convenience and necessity." Neither the regulatory agency, the parties it regulates, nor the consumers they serve can determine from the law as it exists by virtue of these decisions what standard of behavior shall be demanded of interstate pipeline companies with respect to industry-wide competition.

It would apparently depend upon which forum was successfully first stirred to action. If the government can institute suit quickly enough, and prosecute vigorously enough to obtain court action before a defendant can file his application with the Commission, the standards hitherto traditionally developed by the court, by a painstaking process of inclusion and exclusion will be applied. But if the pipeline company can move fast enough, the agency will be allowed to proceed first, ignorant of whether the antitrust laws have or have not been violated, and in some vague way, consider the policy in favor of free competition.[18] How can the agency properly consider the antitrust implications in a given application if it is unable to determine whether such violations have occurred? This is a case which calls for primary *judicial* jurisdiction in order to achieve uniform enforcement of both laws. It follows that the Commission was in error in entertaining the application before the District Court had passed on the validity of the stock acquisition.

It has been often held that courts should defer to agency action where the question is such that it calls for determination by a body of experts.[19] California asks if the much-

18. Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S. Ct. 817 (1937).

19. *Far East Conference v. United States*, 342 U.S. 570, 96 L.Ed. 576, 72 S. Ct. 492 (1951); *U.S. Navig. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L.Ed. 408, 52 S. Ct. 247 (1931).

vaunted Commission expertise is applicable in this case. It is certainly not expert in the solution of problems involving the violation of the Clayton Act; nor did Congress think so, since it did not give this Commission power, as it did the Interstate Commerce Commission, to determine antitrust violations.

It has been held that the doctrine should apply where the general antitrust law has been superseded by the specific regulatory statute.[20] This is not the case here. The Commission has no power to approve stock acquisitions. Its power is limited to the approval of asset acquisitions. Thus, insofar as stock acquisitions are concerned, the Clayton Act is not impliedly repealed.

This is *not* the usual case where an independent regulatory agency has the authority completely to immunize all incidents of a corporate merger from the operation of the antitrust laws. As recognized by the Court of Appeals, Congress did not give the Federal Power Commission authority to approve proposed stock transactions. The sole authority vested in the Commission by the Natural Gas Act with regard to corporate mergers was the authority to approve asset acquisitions. This presents a situation totally unlike that presented by the power of the Interstate Commerce Commission to approve all incidents, including stock transactions, of corporate mergers under the Federal Motor Carriers Act.[21] To say that the Federal Power Commission, in approving an asset acquisition, may impliedly approve the antecedent stock transaction, because the purpose of the stock transaction was not for investment but for asset acquisition, is to amend the Natural Gas Act by judicial fiat, and to add to it language which is not there. It is to invest

20. *U.S. Navig. Co. v. Cunard S.S. Co.*, supra.

21. *McLean Trucking Co. v. United States*, 321 U.S. 67, 88 L.Ed. 544, 64 S. Ct. 370 (1944).

the Federal Power Commission with authority which Congress did not grant to it. It is to divest the Department of Justice and the federal judiciary of the authority granted by Congress to prosecute and determine antitrust questions raised by such stock transactions, and to remove completely from judicial jurisdiction an important and substantial segment of our national economy. This is not accommodation of complementary legislative policies, but rather it is judicial amendment of the statutes.

On the other hand, where no adequate remedy exists in the agency to give the relief demanded, it has been held that primary jurisdiction exists in the courts.[22] This, we say, is this case. The only remedy which the Commission could afford would be denial of the application. It could not order divestiture of the stock. It could only block the acquisition of Pacific's assets. While this would partially remedy the situation, it is not a complete or satisfactory remedy.

B. Such Consideration as Was Given to the Antitrust Issue by the Commission Was Improper and Inadequate.

1. COMPETITION.

The Commission decided that Pacific would never have been a strong competitor of El Paso for the California market. In so deciding, the Commission ignored the fact that Pacific would have been a strong competitor but for El Paso's sustained efforts to wean away from it the customers it was wooing. Thus, California was faced with the unseemly fact of the Commission's rewarding an applicant for the very conduct alleged to be improper.

The Commission also resolved this issue by holding that there would be sufficient competition for the California market from other sources. In so doing it took official notice of

22. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 89 L.Ed. 1051, 65 S. Ct. 716 (1944).

a project which it had not yet authorized, as if that project were in being. In taking official notice of this "fact", the Commission failed to apprise California, until its decision, that it would do so. California was thus deprived of the opportunity to rebut this "proof". We contend that this action was not only illogical, but manifestly unfair.

Further, and perhaps of greater moment, is the fact that there was no exploration before the Commission of the quantity or quality of any competition which might obtain in the future as between the Transwestern project, the Pacific Gas Transmission project, and El Paso. By taking official notice of the possibility—which at that time was all it was—that two other pipelines might be authorized to serve California, the Commission committed grave and reversible error.

2. QUESTIONS UNANSWERED.

While the Commission glibly made such a determination for the reasons announced, it utterly failed to consider the factual questions usually present in antitrust problems. No consideration was given to the size and extent of the market area, the degree of competition existing between the two companies in the past, to the fact that the company to be acquired was virtually a captive corporation at the time of the hearing, or to the prospect of continued and increased competition in the future but for the intervention of El Paso.

We do not contend that the Commission is wholly at fault in this error. It is believed that the basic deficiency in this case is the paucity of law on the subject. It is for this reason that we believe that the question is ripe for a decision by this Court. Just what factors is the Commission to take into consideration in attempting to accommodate the national anti-monopoly policy with the Natural Gas Act? Is the problem to be left as a pure judgment question with the

Commission? Where Congress has not spoken clearly on the interrelationship of policies, is the formation of a policy definition to be left in the hands of but one of the two agencies charged with the enforcement of the acts? Should not this definition be supplied by the federal courts in order to assure uniformity of enforcement and accommodation of the two acts? We submit that it should be, and that the time to do so is now.[23]

3. COSTS AND ABSENCE OF COMPETITION.

California asserted in the court below that the Commission was in error in failing to receive or to require evidence of the effect of the merger upon prospective rates. During the course of the hearing, El Paso offered testimony to the effect that lower rates were in prospect because of the contemplated merger. California attempted to cross-examine to this issue, but was shut off on the ground that the Commission would not convert a certificate case into a rate case (R. 385-7, 443). There was no attempt upon California's part to convert the proceedings into what is commonly thought of as a "rate case" and all that it entails. California was simply attempting to explore on cross-examination a subject which the applicant evidently thought material, since it had opened the question upon direct.

Furthermore, California insists that the prospect of higher costs inherent in the unification of these systems was a highly material issue. California customers as a class comprise the applicant's largest consumer group. California's theory was that El Paso, by this merger, was seeking to fasten eventually Pacific's poor financial situation upon California rate payers. The fact that there was no *imme-*

23. See Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L.R. 436, at 448 (1954).

diate dollar impact involved begs the question. Under established Commission rate making procedures, it was highly probable that the costs of the integrated system would be included in rates to California distributors. What those costs would be was a legitimate avenue to explore.

If it is to be held that the Commission has a positive duty to accommodate the competing policies of the antitrust laws and the Natural Gas Act, then in this case prospective costs as they may affect rates are highly relevant. *This is just the thing that both laws were designed to prevent.* It is highly unrealistic for the Commission, whatever its excuse, to divorce such a consideration from the determination of its approval of the proposed merger. The relevance and materiality of this issue became vital to the disposition of the case in the presence of the antitrust issue.

4. THE VIOLATION OF THE COMMISSION'S RULES AND REGULATIONS.

The Commission and applicants before it must conform to the regulations of the Commission.* Rule 157.6 of Regulations under the Natural Gas Act provides as follows:

> "157.16 *Exhibits relating to acquisitions.*
>
> In addition to complying with the applicable requirements of § 157.14, every application involving acquisition of facilities shall be accompanied by the following exhibits:
>
> (a) *Exhibit Q—Effect of acquisition on existing contracts and tariffs.* A statement showing the effect of the proposed transaction upon any agreements for the purchase, sale, or interchange of natural gas, and upon any rate schedules or tariffs on file with this Commission, together with pro forma rate schedule sheets, notices of cancellation, or other tariff filings required to be made with this Commission." (18 C.F.R. 157.16.)

**Public Service Commission of the State of New York v. Federal Power Commission, et al.*, CADC No. 15366, decided June 15, 1961.

At no time did applicants furnish any showing as to the effect of the proposed transaction upon existing agreements, rate schedules, or tariffs on file with the Commission. Applicants failed to meet the burden of proof the law imposed upon them.

C. The Commission Denied Petitioner a Fair Hearing.

Section 7(c) of the Natural Gas Act (15 U.S.C. § 717f (c)), requiring Commission approval of proposed acquisitions of natural gas transportation facilities, imposes upon the Commission a positive duty to conduct hearings upon applications for such approval. Where an administrative agency has been required to take action only after hearing, it is by law required to conduct a fair hearing (See e.g. Simmons v. U.S., 348 U.S. 397, 99 L.Ed. 453, 75 S.C. 397). Consistently with this requirement, the Commission has promulgated an elaborate scheme of procedural rules designed to insure the fairness of its proceedings (See 18 CFR, Part I, Rules of Practice and Procedure).

The Commission, in receiving evidence and in determining this case, has failed to follow the spirit of its procedural rules, and has arrived at a decision, which, when viewed against the background of its error-infested procedure, can only be considered as wholly arbitrary.

The most obvious errors in the proceedings before the Commission are caused by a combination of circumstances affecting the decision arising from two facts which came to light after the proceedings had been concluded. The Presiding Examiner who received the evidence and rendered the Commission's initial decision, subsequently admitted that he had taken pains to read and consider only 15 or 25 documents out of a total of 500 which he had admitted in evidence. The 15 or 25 which he considered were the only documents out of the great mass which the Commission

had before it which he considered relevant.[24] Secondly, testimony adduced before the House Subcommittee on Legislative Oversight revealed that members of the Commission had been approached by representatives of the applicant in the Commission proceedings informally and ex parte. There are strong indications in this testimony that the Commission was urged to expedite cases which the Commission had before it, and that on at least two or three occasions "business matters" were discussed.[25] In none of the instances recorded in the Committee Transcript was your petitioner given any notice of these meetings.

1. FAILURE TO CONSIDER MATERIAL EVIDENCE.

During the course of the hearing, the Commission's Examiner received in evidence Exhibits No. 420 and 421, prepared by the witness Simonds, a public utility specialist in

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24. On March 14, 1960, in a hearing before the Commission held at Washington, D. C., in that proceeding entitled "In the Matter of Panhandle Eastern Pipe Line Company, Docket No. G-19780," Presiding Examiner Daniel J. Kelly stated this:

> "I just got through writing a decision back in November in the El Paso merger case, where it absorbed the Pacific Northwest Transmission Company. No intervenor opposed the merger except the State of California. The only issues the State of California made at the outset of the hearing was, we don't want just one pipeline bringing gas into the State of California.
>
> • • • • • • •
>
> "There were 71 Items by Reference, making an equal 500 documents that were to be considered in that case.
>
> "I assure you, gentlemen, that when I searched the record for the things that were dispositive of the issue, I didn't examine carefully 15 of those 500 documents. There was no occasion to. There was absolutely no occasion to examine as many as 15 of those 500—maybe it was 25.
>
> "Now, that is what I am talking about, all this unnecessary work that must be done, all this unnecessary overdoing of the case that must be done before we ever determine what the issues are."

25. See Notes 5 and 6, *supra*.

the Bureau of Rates and Gas Certificates of the Federal Power Commission. The significance of this exhibit is its disclosure that, under known and approved cost allocation formulas of the Commission, a total revenue deficiency for the merged system of $60,214,570 in 1960 and $34,659,265 in 1962 had an effect upon rates, and such deficiency had to be measured as against the public interest of the customers of El Paso.

In the light of the Examiner's remarks, quoted above, it cannot be ascertained by Petitioner, or, indeed by any reviewing court, whether or not this Exhibit was considered by the Examiner or by the Commission. Indeed, it is highly likely that it was not, for the Commission held that "any effect which the merger may have upon rates is not before us at this time."

In the ordinary case, the presumptions of regularity and that official duty has been performed would bar this argument. But this is an extraordinary case. The presumptions have been rebutted out of the mouth of the Commission's own representative.

California urges that the Commission's failure to consider admittedly relevant evidence is a denial of the hearing required by the Natural Gas Act, and a denial of administrative due process in contravention of the 5th Amendment,[26] for in this case, the Examiner's decision was that of the agency. The Examiner's failure to consider the whole record in this case is also the agency's failure. During the course of these proceedings various members of the Commission were under ex parte pressure to render this decision expeditiously.[27] That this case was quickly de-

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26. *Lloyd Sabaudo, S.A. v. Elting*, 287 U.S. 329, 77 L.Ed. 341, 53 S. Ct. 167 (1932).

27. See p. 919, Committee Transcript.

cided by the Commission is a matter of record. The Examiner's decision was issued on November 20, 1959. Oral argument was heard by the Commission on December 19th following, and thirteen days thereafter, on December 23, its final order was issued. Moreover, the Commission admittedly adopted its Examiner's report as its own.[28] The Commission decision is a virtual precis of the Examiner's report. By no stretch of the imagination may it be assumed that the Commission gave this case any more consideration than did its Examiner. The Commission has leaned heavily upon a very frail reed.

We are aware of the need to protect administrative integrity, but we insist that even in the institutionalized administrative process of decision that someone, somewhere along the line must address himself to *all* of the relevant evidence.[29] There is much more than a mere shadow of doubt that this has been done in this case. Accordingly, remedial action is necessary.

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28. The Commission stated in its Decision and Order that "• • • we shall adopt the reasoning of the Presiding Examiner as set forth in his decision and discussed briefly below in the light of the exceptions."

29. Rudimentary fair play requires this, despite the size of the record (which volume is generated due to the faultiness of the agency's own practices). "There can be no compromise on the [illegible] ing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio*, 301 U.S. 292, 305, 81 L.Ed. 1093, 57 S. Ct. 724 (1937).) See also, *Morgan v. United States*, 298 U.S. 468, at 481, 80 L.Ed. 1288, 56 S. Ct. 906 (1936): "• • • (T)he weight ascribed by the law to the findings • • • rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."

2. WHOLESALE ADMISSION OF IRRELEVANT EVIDENCE IS A DENIAL OF ADMINISTRATIVE DUE PROCESS.

Examiner Kelly's remarks about his treatment of the evidence of record in this case may be construed as the protest of a conscientious man against the overburdening of the record by counsel out of an abundance of caution. This is the way the court below construed it.

It must be remembered, however, that Examiner Kelly not only wrote the Commission's initial decision, but that he also presided over the reception of evidence. Each of the 500 documents he complains of were received in evidence by him. Presumably he considered them relevant. He could have excluded them as being cumulative, collateral to the main line of inquiry, as an unnecessary burden to the record. He did not do so. Yet he indicates that out of the 500 documents he received he considered only 15 or 25 to be material and relevant.

Where does this information leave litigants before the Federal Power Commission? Presumably the practice of counsel in introducing "kitchen-sink" applications will continue, for the Commission has not indicated just which 1/20th of the evidence it considers relevant. Yet the fact remains that 19/20ths of such evidence shall probably receive but scant consideration. If this is annoyingly expensive to applicants, it is disastrous to protestants and intervenors. How are we to know, out of the great mass of information which an applicant will introduce at a Commission hearing, which points to rebut? We are put in the position of playing a guessing game, of playing "blind-man's buff."

We think it is not too much to ask that we be entitled to know the precise contentions of our adversaries which the Commission will consider determinative.[30]

2. EX PARTE CONTACTS.

We know that members of the Commission were approached during the course of this litigation by representatives of our adversary. We do not know the precise content of their conversations, nor whether or not these conversations prejudiced our case.[31] Nonetheless, we insist that this is a state of affairs that can no longer be endured.

This Court has often in the past taken an active role in the supervision of the administration of justice in the Federal government. It is too well-settled to require citation of authority that the independent regulatory agencies engage in the administration of justice. The Federal Power Commission here has taken action which has affected substantial rights.

Persistent ex parte contacts with the members of the Commission during the course of litigation so infect the

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30. *Morgan v. United States*, 304 U.S. 1, 82 L.Ed. 1129, 58 S. Ct. 773 (1938); *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio*, 301 U.S. 292, 81 L.E. 1093, 57 S. Ct. 724 (1937); *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 68 L.Ed. 1016, 44 S. Ct. 565 (1924); *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88, 57 L.Ed. 431, 33 S. Ct. 185 (1913); and see Opinion of Warren, C.J., dissenting, in *Gonzales v. United States*, 364 U.S. 59, at 73, 4 L.Ed. 2d 1569, 80 S. Ct. 1554 (1960): "In requiring a hearing, Congress did not mean, in my opinion, that a guessing contest would suffice • • • I doubt that anyone would maintain that there would be a hearing in any true sense of the word if such a person were told by the Department that he could appear and say whatever he wished, but that the Department would not indicate to him what it considered pertinent—indeed, what it considered conclusive unless rebutted • • •."

31. This does not bar this complaint. See *Simmons v. United States*, 348 U.S. 397, 99 L.Ed. 453, 75 S. Ct. 397 (1955). Accord. *Inland Steel Co. v. National Labor Relations Board*, 109 F.2d 9 (1940).

Commission's decision with error that it cannot stand. They present to a reviewing court a case that cannot be reviewed, for under present law, it cannot be determined by the courts whether or not prejudicial information has been submitted ex parte; it cannot be determined whether the opponent has had opportunity to rebut such presentations.[32] In the case of the independent regulatory agencies, to permit such practices to go uncondemned initiates a most insidiously eroding process. These agencies must constantly deal with the same small group of applicants. Under constant pressure, by highly skilled representatives, the most fair-minded, conscientious and scrupulous man cannot help but develop, perhaps unconsciously, a degree of bias. Upon this battleground, the consumer stands unrepresented. In cases where such a defect appears, the situation can be alleviated by the courts. They have done so in the past.[33]

This practice must be absolutely proscribed. The public has an interest in the integrity of government. Integrity equals reputation. Reputation equals appearance. Public confidence in the integrity of government cannot long survive if conduct, however based in good faith it may be, gives the appearance of venality and corruption.[34]

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32. *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio, supra; W. Ohio G. Co. v. Pub. Util. Comm. of Ohio*, 294 U.S. 63, 79 L.Ed. 761, 55 S. Ct. 316 (1935).

33. *Sangamon Valley TV Corp. v. United States*, 269 F. 2d 221 (1959); *Brown-Pacific-Maxon Co. v. Toner*, 255 F.2d 611 (1958). See also, *United Air Lines, Inc. v. Civil Aeronautics Board*, CADC Docket No. 15414, and *Trans World Airlines, Inc. v. Civil Aeronautics Board*, CADC Docket No. 15415, decided May 19, 1960, United States Court of Appeals for the District of Columbia. (Unreported.)

34. No less than conflicts of interest in government officers, this is conduct which "• • • endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those that govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse

A consideration relevant to the appearance of improper conduct, as here, is the absolute inability of a state or other intervenor to take measures to protect itself. California possesses no means or powers by which it can investigate apparently wrongful conduct. California, by law, is precluded from inquiry into conduct which may have resulted in prejudicial error against it. This great obligation rests with the agency—and self-inquiry leaves much to be desired.

California is aware that the question of administrative conduct is a recurring one, touching upon the responsibility of all branches of government. Much has been said as to the need for improvement. This Court is now furnished an opportunity to impose a high standard, for all time, upon public servants. If conduct such as this can be the basis for censure it will soon be stopped. An interest in public morality far exceeding the interest of California in this case is here involved.

It has been often said that the Commission's discretion is virtually boundless and unfettered. Given such great powers, there is all the more reason that it should be required

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suspicions of malfeasance and corruption." (Warren, C.J., in *United States v. Miss. Valley Generating Co.*, No. 26, October Term, 1960, ... U.S. ....., 5 L.Ed. 2d 268, 295, 81 S. Ct. ..... (1961).) See also, the President's Special Message to Congress, "Ethical Conduct in the Government," (107 Cong. R. 6454, H. Doc. No. 145): "No responsibility of Government is more fundamental than the responsibility of maintaining the highest standards of ethical behavior by those who conduct the public business. There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality, and complete devotion to the public interest. *This principle must be followed not only in reality but in appearance. For the basis of effective Government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter.*" (Emphasis added.)

to implement the rules which it has promulgated to insure the highest standards of ethical conduct.[35]

4. OTHER ERRORS.

In conducting these proceedings, the Commission has fallen into other procedural errors. Each of these errors worked to deny petitioner the fair hearing to which the statute entitled it. Cumulatively, they are fatal to the Commission's decision, even when the gross mistakes discussed above are ignored.

The Commission had to decide whether its approval of the application would work to diminish competition among pipeline companies in the Western United States. In aid of its opinion that it would not, it took official notice of then current applications for its approval of pipeline construction projects. At the time of the decision, hearings on these applications had not been concluded. The pipelines were not in being, nor was it then officially assured that they would be. Would it be in the public interest for these unrelated applications to be approved in the light of the El Paso application? What would be the effect on competition if they were? What opportunity was afforded petitioner to

35. *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio, supra; Interstate Commerce Commission v. Louisville & Nashville R. Co., supra.* The Commission's Rules of Practice and Procedure incorporate by reference the standards of ethical conduct required of practitioners in United States Courts (18 CFR. rule 1.4(a)(3)). The failure of the Commission to adhere to its own rules (See e.g. Rule 1.4(a)(3), supra, in connection with Canon 3 of the Canons of Professional Ethics of the American Bar Association) invalidates its decision and order. *United States v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681, 74 S. Ct. 499 (1954); *Chapman v. Sheridan Wyo. Coal Co.*, 338 U.S. 621, 94 L.Ed. 393, 70 S. Ct. 392 (1950). See also, *Public Service Commission of the State of New York v. Federal Power Commission, et al.*, CADC No. 15366, decided June 15, 1961; *Sangamon Valley TV Corp. v. United States, supra; Jeffries v. Olesen*, 121 F. Supp. 463, 476 (1954).

argue these issues? Did the Commission take notice of more than the bare applications? Or had it, before the conclusion of hearings, decided to approve them? We do not know.[36]

The Commission permitted the applicant to adduce evidence tending to show that approval of the application would result in lower rates. Yet when petitioner attempted to cross examine on this issue, it was foreclosed with the excuse that the Commission did not intend to convert its certificate proceeding into a rate case. Denial of the right of cross examination impaired the fairness of this proceeding and prejudiced petitioner's case.[37]

CONCLUSION

We respectfully request the opportunity to present these questions to the Court more fully. They are important questions of public law. Their resolution will have far-reaching effect.

They are questions which call for prompt and authoritative decision. Until they are decided, the application of the anti-trust laws to the regulated natural gas industry is left

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36. See note 31, *supra*. See also, *R. Comm. of Calif. v. Pacific G. & E. Co.*, 302 U.S. 388, 82 L.Ed. 319, 58 S. Ct. 334 (1938).

37. Where Congress has commanded an agency to act only after hearing, this Court has been quite explicit in defining the procedural rights of litigants: "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." (*Interstate Commerce Commission v. Louisville & Nashville R. Co.*, *supra*.)

a quaking morass. Public cynicism with respect to federal economic regulation of the natural gas industry grows apace.

They are questions which affect millions of citizens involving billions of dollars.

We respectfully submit that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

WILLIAM M. BENNETT
PAUL M. HOGAN

Special Counsel for the People of the State of California

(Appendices follow)

Appendix A

United States Court of Appeals
for the District of Columbia Circuit

No. 15687

PEOPLE OF THE STATE OF CALIFORNIA, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT
EL PASO NATURAL GAS COMPANY, INTERVENOR

On Petition for Review of Orders of the Federal Power Commission

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Decided March 30, 1961

Mr. William M. Bennett for petitioner.

Mr. Arthur H. Fribourg, Attorney, Federal Power Commission, with whom *Mr. John C. Mason*, General Counsel, Federal Power Commission, *Mr. Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, and *Mr. Robert L. Russell*, Assistant General Counsel, Federal Power Commission, were on the brief, for respondent.

Messrs. Charles V. Shannon and *Arthur H. Dean*, with whom *Mr. Stanley M. Morley* was on the brief, for intervenor.

Mr. Richard A. Solomon, Attorney, Department of Justice, with whom *Mr. George D. Reycraft*, Attorney, Department of Justice, was on the brief, for the United States of America, as *amicus curiae*.

Before MR. JUSTICE BURTON, retired,* and PRETTYMAN and FAHY, Circuit Judges.

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*Sitting by designation pursuant to Sec. 294(a), Title 28, U.S. Code.

OPINION

PRETTYMAN, *Circuit Judge*: This is a petition by the State of California to review an order of the Federal Power Commission[1] authorizing El Paso Natural Gas Company (hereinafter referred to as "El Paso") to acquire and operate the facilities of Pacific Northwest Pipeline Corporation (hereinafter called "Pacific") by a merger of the two corporations.

El Paso was organized as a natural gas company in 1928, and its principal business today is the transportation and sale of natural gas. Its chief sources of gas are in the Panhandle and Permian Basin fields of west Texas and the San Juan Basin in northwestern New Mexico; and it also obtains gas from Canada and through agreements with other pipeline companies. The company operates some 8,000 miles of main transmission lines, which extend in two parallel systems from western Texas, across New Mexico and Arizona to the California border. Expansion of El Paso's operations to California began in 1946, and the company's business expanded greatly in the following decade. Although it has many customers along its pipeline routes in Texas, New Mexico, and Arizona, the great bulk of its certificated capacity—2.1 million of a total of 2.7 million Mcf per day—is devoted to sales made at the Arizona-California border to three California distribution companies. It has no pipelines or facilities within California. At the time this litigation was initiated El Paso was the sole out-of-state supplier of natural gas to California, and it provided well over half of the state's total supply.

Pacific was incorporated in 1949 and was certificated in 1954 to serve the Pacific Northwest region, the only large

1. 22 F.P.C. 1091 (Dec. 23, 1959). The petition herein also seeks review of an order denying rehearing and a stay, 23 F.P.C. 350 (Feb. 17, 1960).

area of the country not then served with natural gas. Construction of its system was completed in 1956, and at the time of the merger it owned more than 2,000 miles of pipelines extending from the Canadian border through Washington, Oregon, Idaho, Wyoming, Utah and Colorado. It obtains its gas supplies in the San Juan Basin, in several smaller fields in the Rocky Mountain area, and from Canada. Pacific is authorized to sell gas in all the states through which its lines extend, and it has a system capacity of about 646,000 Mcf per day. In 1958 its sales averaged about 500,000 Mcf per day.

In December, 1954, shortly after Pacific had been certificated, Pacific and El Paso entered into an agreement whereby the latter was to purchase 250,000 Mcf per day of Canadian gas from Pacific. Simultaneously, Pacific contracted with Westcoast Transmission Company, Ltd., a Canadian gas company, to purchase 300,000 Mcf per day. The El Paso-Pacific contract was subsequently modified to provide for the purchase by El Paso of up to 100,000 Mcf per day of this Canadian gas. El Paso's president testified that it was at the time of these negotiations that his company first became interested in acquiring Pacific. Such an acquisition, he said, would provide El Paso with direct access to extensive undeveloped reserves of dry gas in Canada and the Rocky Mountain area and would give Pacific needed additional markets for its gas.

During the early part of 1955 the two companies discussed the possibility of a merger, but the talks broke down after a disagreement as to the method of merger. El Paso insisted that the merger be carried out in such a way as to require the approval of the Federal Power Commission under Section 7(c) of the Natural Gas Act, that is, a merger of the assets of the two corporations. Pacific, which was then involved in financing and constructing pipelines, wanted to

avoid extended proceedings before the Commission, and it insisted that the merger be accomplished by an exchange of stock.[2] In further negotiations El Paso proposed a stock exchange to be followed by an asset merger, but this was rejected by Pacific because of a disagreement on price and also because of its continued reluctance to go before the Commission. Talks resumed in August, 1956, and on November 8, 1956, the companies signed an agreement for the exchange of stock. By May 1, 1957, El Paso had acquired 99.8 per cent of Pacific's stock.

On July 22, 1957, the Attorney General of the United States filed a civil action in the United States District Court for the District of Utah, attacking the stock acquisition as a violation of Section 7 of the Clayton Act. On August 7, 1957, the companies filed applications for approval of a merger of their assets.[3] This step had been authorized by their respective boards of directors on the preceding July 16th and was, by El Paso's own admission, "considerably stimulated" by the imminence of the Clayton Act suit.[4] The Commission

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2. It is clear that at least one of the reasons El Paso desired an asset merger was its belief that a Commission-approved acquisition of properties was less susceptible to attack under the antitrust laws than was a stock acquisition. El Paso's president testified that when merger was first considered by them they requested an opinion from their counsel on the antitrust implications of such a transaction. The following colloquy took place later in the proceedings:

> "[Q. By F.P.C. Staff Counsel.] And at the time were you concerned with the possibility of the Justice Department objecting? [A.] Well, we wanted to do it that way, irrespective of the Justice Department, but it was perfectly apparent that from the standpoint of avoiding any possibility of trouble that was a better way to do it."

3. These took the form of an application by Pacific under Section 7(b) of the Act for permission to abandon facilities and services and an application by El Paso under Section 7(c) for a certificate approving acquisition of Pacific's facilities.

4. In both the November 8, 1956, stock exchange agreement and a proxy statement sent out to its shareholders shortly thereafter, El Paso represented that it had no present intention to merge the

refused a request by the Justice Department to suspend proceedings on the applications until the District Court decided the antitrust case, and it scheduled hearings for September 17, 1958. The Antitrust Division of the Justice Department was invited by the Commission to participate, but it declined. On October 13, 1958, the District Court in Utah granted a continuance pending final determination by the Commission of the applications before it.

The merger was approved by the Presiding Examiner on November 20, 1959. Exceptions were filed by California, and on December 23, 1959, the Commission affirmed the Examiner's decision. A certificate was issued to El Paso,[5] and the merger was consummated on December 31st. After the asset merger the United States amended its Clayton Act complaint to include this merger as well as the stock acquisition.

Throughout these proceedings the State of California has taken the position that it should not be wholly dependent on a single company for its out-of-state gas supplies. It seeks the benefits of competition among suppliers and argues that the merger, if upheld, will eliminate a potential competitor to El Paso.

The principal contentions of California may be distilled into three: (1) The Commission did not give sufficient or proper attention to the impact of the merger upon future rates to customers; (2) the Commission failed to give proper attention and effect to the policies and terms of the antitrust laws; and (3) California was denied due process,

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two companies or to acquire the assets of Pacific. According to testimony at the hearing these representations were made at the request of Pacific after the Internal Revenue Service had indicated that it would require such statements before ruling that the exchange would be tax-free to Pacific stockholders.

5. Pacific's application to abandon, see note 3, *supra*, was denied, on the ground that no abandonment of service would actually occur. Instead, Pacific's certificates were rescinded and identical certificates were issued to El Paso.

in that the Examiner failed to examine documents filed in evidence. In the second contention it is supported by the United States as *amicus curiae*. Petitioner also attacks the conclusions of the Commission concerning various features of the proposed merger in respect to the public convenience and necessity. We have examined these latter points, the supporting evidence, and the findings and conclusions of the Commission. It is sufficient to say that decisions on such questions lie largely within the expert judgment of the Commission, and we find the conclusions reached in this case to be well within that area. We turn, then, to the principal contentions, as above stated.

Petitioner summarizes its contentions in respect to the rate inquiry as follows:

> "By precluding inquiry into economic impact and denying examination upon future rate structure the Commission denied due process to California; created a record devoid of evidence upon an indispensible item of proof, to wit, public convenience and necessity measured in terms of the cost of merger to the consuming public; authorized a merger as being in the public interest with no inquiry of its cost impact to the public."

Petitioner makes clear in its argument that it contends there was a burden of proof upon El Paso, the applicant, to present evidence as to specific future rates after the proposed merger, and that the Commission erred in refusing to go into that subject. The Examiner ruled clearly and succinctly on the matter. He said:

> "It seems to me there can be no aggrievement when there is no dollar impact at the present time on the consumer. It is merely a question of determining the public interest, and you must have some general idea whether it is going to be an [exploitation] of the customer—I realize all that. That is what the purpose of the certificate proceeding is.

"But when you get down to dollar impact, it does not come about until the rates are changed.

* * * *

"Well, unless I am directed to do so by order of the Commission, I am not going to make a rate case out of this—whether they are lawful under Section 4(a) or 4(b), whatever it is, of the Act. I am not going to do it unless directed to do it."

The Commission agreed with the Examiner.

We think the Examiner ruled correctly on the point and the Commission was correct in sustaining him. Increases in rates must under the scheme of the statute be proposed by the utility company. The Commission then, under either Section 4(e) or Section 5(a) of the statute, can determine the lawfulness of the proposals. No contention is made that the existing rates of the companies are unreasonable. No increases were proposed in connection with this merger, and a specific provision was inserted in the order that none should be proposed for a year after the merger. Schedules of rates are complicated affairs, involving classifications of customers and services, with underlying considerations of allocable costs. In the absence of any proposals for increases, a rate inquiry as to possible future requests would be entirely speculative. The Examiner correctly said, we think, that the "dollar impact" of the merger would have to await a rate inquiry. Of course such a future inquiry would involve consideration of costs, and the Commission was concerned lest the costs of the two systems be mingled after the merger in such fashion that the higher costs of one merged company might be imposed in part upon the former customers of the other company. California vigorously insisted that the cost of service would continue to be high for gas originating on the Pacific system and that the cost differential would at a future date be imposed on El Paso's custo-

mers in California. To make sure it would be able to deal with that problem should it arise, the Commission provided that the costs of the two merged companies should be kept separately.

Under our regulatory system, rates depend in large part on costs. If a merger must inevitably result in higher costs, this is a critical factor to be weighed in determining the public interest in the merger. Of course, if the merger creates new benefits for consumers, higher costs may be justified to some extent. Allocations of costs as between the two underlying systems may be an eventual factor in a rate case. The Commission protected that eventuality. The forecasts of both the Examiner and the Commission in the case at bar were that costs would be lessened in the long run. For example, the record shows that about one-half of the gas marketed by El Paso is residue gas, that is, gas produced as an adjunct to the production of oil. The average life of an oil well is relatively short; and, because the amortization period of the company's capital debt is related to the life of its reserves, El Paso has had a high amortization rate on its bonds, and consequently high financing costs. By the attachment of Pacific's extensive reserves of "dry" gas, that is, gas produced from gas wells, the life of El Paso's reserves will be increased and the cost of future financing will be correspondingly reduced. In addition, there is ample support in the record for the conclusions that substantial savings in total operating expenses and lower unit cost of transportation will be realized as a result of the merger. In sum, we think an inquiry into specific future rates was not required. Inquiry into the effects of the merger upon future costs, and thus perhaps ultimately upon future rates, was one of the factors to be weighed in evaluating the public interest in the merger. The Commission made such an evalu-

ation, and we think it is sufficiently supported. We are of opinion that the contention of California on this point cannot be sustained.

Petitioner and the United States as *amicus curiae* contend that the Commission based its approval in part upon the erroneous thought that its approval of the proposed asset acquisition would immunize that transaction from liability under Section 7 of the Clayton Act; and that the Commission, in applying the standard of public interest, failed to give adequate consideration to the charges of illegality under the Clayton Act.

Section 7 of the Clayton Act contains, in pertinent part, the following as its last sentence:

> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the * * * Federal Power Commission * * * under any statutory provision vesting such power in such Commission * * *."

The question whether a transaction duly approved by the Commission, acting within its statutory authority, is or is not thereafter subject to the antitrust laws is not before us. The Commission has no authority to pass upon that question, and it has not purported to do so here. Its function is to approve—or not to approve—a proposed transaction. What status its conclusion may have in other areas or what happens thereafter to the transaction is not for the Commission to determine. The Commission has ample power to approve—or disapprove—the acquisition by one natural gas company of the assets of another such company. It has approved the one before us. It has no authority to declare the transaction immune from any antitrust law. The immunizing, if any, is done by the statute itself. The statute is a flat, simple statement, "Nothing contained in this section shall apply", etc. Thus the Congress itself described a

boundary to its antitrust enactment. It did not confer upon the Power Commission authority to construe or execute that statute. It left that construction and execution to those authorities having to do with enforcement of the Clayton Act. But, we must caution in that regard, the Congress did put the approval of certain transactions in certain fields in the hands of a specified agency. It put approval of gas facility acquisitions in the hands of the Power Commission. It did not put that power in the hands of other authorities. This was a distribution of enforcement power among enforcement authorities, and the lines of the distribution must be recognized and respected.

This brings us directly to the second phase of the argument on the point. This argument is (a) that the Commission, in considering whether to approve a transaction, must give heed to the policies and provisions of the antitrust laws, and (b) that it did not sufficiently do so in this case. We agree with (a) and disagree with (b).

To approve a transaction the Commission must find it to be in the public interest. Clearly, the public interest includes the solution of problems in so important an area of economics and law as the so-called antitrust area. The Commission must consider the public policy, as declared by the Congress, in these respects. But here again a caution is in order. We are here dealing with the interweaving of free competition, regulated monopoly, and the public interest. Free competition is a basic postulate of our free enterprise system, but it is not always—in all conditions—in the public interest; sometimes regulated monopoly, or a measure of controlled monopoly, is in the public interest. The policy of the antitrust laws is to foster free competition. The policy of regulatory measures such as the Natural Gas Act is public regulation of controlled monopoly, or partial monopoly. Thus, in the fields of merchandising and

manufacturing, the law prohibits interference with competitors or competition and requires full and free play to rivalries in the marketplace. The resultant constrictions upon prices and practices are deemed to be in the public interest. But, in the field of public utilities, monopoly, or partial monopoly, under public regulation is deemed to be in the public interest. Public utilities are treated as public services. The principal requirement is service, and service is not a necessary result of a competition bent on mutual destruction. Thus, for example, the public interest may require only one air carrier, or one railroad, between two points, or only one gas pipeline out of a given field or over a given area. Frequently a regulatory agency must determine whether one, two, or more companies should operate at a given place under given circumstances. A determination that only one regulated utility should operate is not in contravention of the antitrust laws. The antitrust laws and the regulatory laws are not in conflict; they are complementary. Both have as their objective the public interest. They deal with different subject matters. They have been entrusted by the Congress to different enforcement agencies. When the Power Commission considers the policies and provisions of the antitrust laws in respect to the transactions of utilities under its jurisdiction, it is not required to—and indeed should not—begin with a general premise that competition is always and under all circumstances in the public interest. Its premise should be that the antitrust laws in certain areas of our economy and the regulatory laws in other areas are supplementary enactments and each must be given full effect in its area, recognizing always its concomitant body of law in the other area. The Commission must recognize the policies of the antitrust laws, but it must also recognize its own responsibilities under its own laws.

This brings us to consider what the Commission had to say in respect to the antitrust laws. The Commission took note of the terms and policy of the Clayton Act and stated its own responsibility under that Act and under the Natural Gas Act. It concluded that the elimination of Pacific as a potential competitor was not significant for two reasons: First, because of Pacific's poor financial condition it could not be considered a serious competitor to El Paso in California; and, second, there was in prospect substantial additional competition for El Paso in the expanding California market. Beyond this the Commission found that the public interest would be served in several respects by the merger: The combined system would be considerably strengthened by the increase in available gas supplies; development of sources and markets would be stimulated; the merged company would be in a stronger financial position; existing gas supplies could be more effectively used to meet emergencies in periods of peak demand; and, finally, cost saving would be realized that would ultimately be reflected in lower rates. Thus the Commission weighed one set of factors against the other. It did take into account the policies of the antitrust law and put them in the scale of factors. We think its course of action was its duty, well within its authority, and was a reasonable process. We find no error.

The United States argues that the Commission should have considered specifically the legality *vel non* of the stock acquisition as such. It stresses admissions on the part of El Paso officials that concern over the antitrust action prompted the asset acquisition. It says the asset transfer takes on the character of the antecedent stock acquisition and is to be judged by standards of the antitrust law. We think the transaction should be viewed realistically in its true and real nature. This was clearly a transaction for the acquisition of facilities and the consequent combination of those facilities into a single system. It was not basically

a stock transaction, which, standing alone, is usually an investment venture. This was not considered or treated by the participants as an investment venture; it was a combination of physical facilities. The Commission has authority to approve the acquisition of facilities; the Natural Gas Act does not mention acquisitions of stock. Of course the acquisition of portions of the stock of a company is not an acquisition of assets. But it seems to us that the acquisition of all the stock of a company (or, as in this case, 99.8 per cent of the stock), with a consequent transfer of assets from the acquired subsidiary to the acquiring parent, is an acquisition of assets. It is indeed one of the most usual methods of acquiring assets. We think the transaction here involved cannot be split into two separate and independent transactions — one the acquisition of all the stock, over which transaction the Commission has no authority, and the other a transfer of assets, authority over which would be meaningless in terms of acquisition. So to view the transaction would (1) be unrealistic and (2) destroy the effectiveness of authority of the Commission over combinations of facilities. Congress intended this authority to be real and effective. We think that purpose cannot be thwarted by the simple procedure of first acquiring all the stock and then making an intro-company transfer of assets. It might be said that the Commission could refuse to permit a consolidation of facilities even though they were wholly owned by one company. Such a refusal would be meaningless in terms of ownership and control. Congress spoke of acquisitions, not of mere bookkeeping transfers. We think the acquisition of all the stock, vesting actual ownership, beneficial although not formally legal, in the

acquirer, plus the subsequent transfer of the assets, made up the transaction of acquisition of the facilities.

California argues that the Examiner failed to accord it due process, in that he failed to give proper consideration to the record. Upon another occasion, in another proceeding, the Examiner remarked upon the needless volume of the record in this case. He said that, out of some 500 exhibits, between 15 and 25 were dispositive of the issue and there was no occasion to examine any more. He referred to "all this unnecessary work that must be done, all this unnecessary overdoing of the case that must be done before we ever determine what the issues are." We think the Examiner's remarks were both apt and appropriate. The inundation of the material with immaterial minutiae is one of the griefs which beset the administrative process. It is well to recognize it.

The order of the Commission will be

Affirmed.

FAHY, *Circuit Judge, dissenting:* Because of the matter now to be briefly discussed I am not able to agree entirely with the opinion of my Brother Prettyman, with most of which, however, I do agree.

The acquisition by El Paso Natural Gas Company of some 99 per cent of the stock of Pacific Northwest Pipeline Corporation led the United States to prepare to file suit against El Paso attacking the acquisition of the stock as a violation of section 7 of the Clayton Act. The suit was later filed in the District Court of the United States for the District of Utah. When the responsible officials of El Paso learned of the plans of the United States to file suit, the corporation, by using the very stock control being questioned by the United States, acquired Pacific Northwest's assets and facilities and then applied to the Commission for approval of this merger under section 7(c) of the Nat-

ural Gas Act.[1] The approval of the Commission was given in the order under review.

Assuming that the Commission has authority under its statute to immunize an asset merger from the antitrust laws of the United States, particularly section 7 of the Clayton Act, it is my opinion that the order approving the instant merger should not be affirmed. I am of this opinion because if the stock acquisition attacked in the suit filed by the United States is invalid under the antitrust laws the acquisition by El Paso of Pacific Northwest's facilities, constituting the merger which was approved, was contrary to public policy because accomplished by stock control obtained in violation of the antitrust laws. Clearly this would be a relevant consideration in determining whether the merger, though otherwise serving the public convenience and necessity, should be found to do so. If not invalid as contrary to public policy at least such a merger should be reconsidered in event the antitrust suit results favorably to the United States. This is not simply a matter of whether the public convenience and necessity would be served by the merger upon consideration of other relevant factors, including the general policy of the antitrust laws: it is a matter of whether a merger, accomplished by a particular illegal acquisition of stock, can be approved consistently with sound public policy or be said to serve the public convenience and necessity.

For the reasons above stated I agree with the position of the United States as *amicus curiae* that the decision of the Commission should be vacated and the cause remanded with instructions that the Commission either deny the application for approval of the merger or await the outcome of the antitrust litigation.

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1. If it is not clear, as I think it is, that the acquisition of the assets of Pacific Northwest by El Paso was a consequence of the action taken by the United States under the antitrust laws, it is certain that the contrary also is not clear, and the truth of the matter should be determined.

Appendix B

Clayton Act, Act of October 15, 1914, c. 323, § 7.

Acquisition by One Corporation of Stock of Another.

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

* * * * * * *

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdic-

tion under section 79 of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Natural Gas Act, Act of June 21, 1938, c. 556, § 7.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be

necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: * * *.

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